

ORIGINAL

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(S E R V E D)  
( June 26, 2000 )  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

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DOCKET NO. 99-15

DAVID P. KELLY AND WEST INDIES SHIPPING AND  
TRADING, INC. - POSSIBLE VIOLATIONS OF THE  
SHIPPING ACT OF 1984

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ORDER

On August 13, 1999, the Federal Maritime Commission ("Commission") issued an Order of Investigation and Hearing in this proceeding. The Order was issued to determine whether West Indies Shipping and Trading, Inc. ("West Indies Shipping"), a non-vessel-operating common carrier ("NVOCC"), and its president and sole shareholder, David P. Kelly ("Kelly"), violated sections 8(a)(1), 10(a)(1), 19(a), 19(b)(1), and former section 23(a) (pre-OSRA) of the Shipping Act of 1984 ("Act"), 46 U.S.C. app. §§ 1707(a)(1), 1709(a)(1), 1718(a), and 1718(b)(1), and former § 1721(a).

The Commission's Bureau of Enforcement ("BOE") was made a party to the proceeding, and the case was assigned to Chief Administrative Law Judge Norman D. Kline ("ALJ"). The discovery portion of the litigation before the ALJ then commenced.

On April 7, 2000, BOE filed a motion before the ALJ requesting that he amend the Order of Investigation and Hearing

to encompass section 10(b)(1) of the Act, 46 U.S.C. app. § 1709(b)(1). BOE argues that it has uncovered evidence in the discovery portion of this proceeding indicating that Respondents , may have violated section 10(b)(1).

On April 20, 2000, one day before the reply was due, Respondents requested additional time to reply to BOE's motion. BOE opposed the request, which was not made in compliance with FMC regulations requiring a request for an enlargement of time to be made at least 5 days prior to the date on which the pleading is due to be filed. See 46 C.F.R. § 102(a). The ALJ denied the request for additional time, in a ruling issued on April 25, 2000, finding that Respondents are not entitled to respond to a motion to amend the Order of Investigation and Hearing, but will be able to respond to any additional evidence and arguments submitted by BOE as a result of any amendment to the Order, when appropriate.

As to the merits of BOE's motion to amend, the ALJ found that such a motion is properly directed to him in the first instance. See ALJ Order at 3 n.1 (citing Expeditors International of Washington, Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1072 (1999)). However, he further ruled that the Commission has 'expressly reserved to itself the right to amend its Orders of Investigation so as to add sections of the Shipping Act to the investigation." ALJ Order at 3. Finding BOE's motion

beyond his authority, the ALJ referred it to the Commission, under Rule 73(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.73(a).

#### DISCUSSION

In finding the motion beyond his authority, the ALJ properly cited Rules of Practice and Procedure, 16 S.R.R. 1387, 1388' (1976), where the Commission stated that "a presiding officer cannot 'enlarge' a proceeding by the addition of respondents or sections of the shipping statutes." Whether to add (or remove) sections of the Act from an order of investigation is an issue reserved to the Commission, as is the issuance of the order of investigation in the first place.

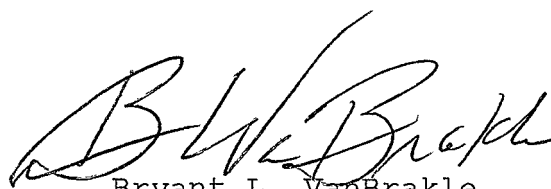
In the instant proceeding, the section sought to be added, section 10(b)(1), prohibits a common carrier from providing transportation for less than the tariffed or contracted rates via fraudulent or unjust or unfair devices or means. The statutory provisions already invoked in the Order of Investigation primarily relate to the Respondents' obligations as a shipper or intermediary (sections 10(a), 19 and 23), except for the section 8 reference, which relates to having a filed (now published) tariff.

As noted by the ALJ and by BOE, Respondents will have the same opportunity to respond to any new charges that would be added to the Order of Investigation and Hearing, as they have had

with respect to the original charges. Granting the motion may necessitate some extension of the time for discovery to be completed, but Respondents will not be prejudiced by an amendment to the Order. Upon consideration of the nature of the amendment sought, the effect of the amendment on the proceeding, and the absence of detriment or prejudice to Respondents, the Commission has determined to amend the Order of Investigation and Hearing in this case.

THEREFORE, IT IS ORDERED, That the Order of Investigation and Hearing is amended to determine whether Respondents David P. Kelly and West Indies Shipping have violated section 10(b)(1) of the Act by allowing any person to obtain transportation for property at less than the rates or charges shown in Respondents' tariff by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means.

By the Commission.

  
Bryant L. VanBrakle  
Secretary